Supreme Court, U.S.
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No. 99-969

IN THE SUPREME COURT OF THE UNITED STATES

October 1999 Term

MISTICK PBT,

Petitioner,

vs.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN E. BEARD, III *(Counsel of Record)*
PETER N. FLOCOS
KIRKPATRICK & LOCKHART LLP
HENRY W. OLIVER BUILDING
535 SMITHFIELD STREET
PITTSBURGH, PA 15222-2312
(412) 355-6500
Counsel for Petitioner

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STATEMENT UNDER SUP. CT. R. 29.6

Petitioner Mistick PBT is a Pennsylvania business trust and is not a "corporation" under Pennsylvania state law. In any event, Mistick has no parent or subsidiary company ("subsidiary" being defined as ownership by Mistick of greater than 50%).

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PRELIMINARY STATEMENT

On December 8, 1999, Petitioner Mistick PBT ("Mistick" or "Petitioner") filed a Petition for Writ of Certiorari (the "Petition") with this Court. Mistick files this Reply Brief in reply to the Briefs in Opposition to Mistick's Petition filed on or about February 7, 2000 by Respondents Astorino and HACP (as defined in Mistick's Petition). As discussed in more detail below, Respondents' Briefs systematically avoid, obfuscate, misunderstand and otherwise fail to refute the compelling reasons for granting *certiorari*, as set forth in Mistick's Petition.

Most notably, Respondents concede, although attempt to muddle, a divergence of decisions among the United States courts of appeals with regard to the interpretation of the "based upon" phrase used in the private litigant (*qui tam*) jurisdictional bar of the False Claims Act (the "Act"), 31 U.S.C. §3730(e)(4)(A), as amended by Congress in 1986. This circuit split has gravely weakened the effectuation of critical national policy goals and must be resolved by this Court. Each year, tens of billions of federal dollars, including an estimated $20 billion of Medicare funds, are lost due to fraud, despite Congress' clear and express intention in 1986 to encourage more private policing of fraud through the amendments to the Act's *qui tam* provisions. *See* Mistick Petition, at 11-16. Unless the circuit split is resolved as Mistick urges, recovery of the dollars lost due to fraud and the bringing to justice of the perpetrators will be dramatically impacted and dependent upon mere fortuity,

e.g., in which circuit the perpetrators happen to be located.[1]

REASONS FOR GRANTING THE PETITION

I. Respondents Concede That a Split Exists Among the United States Courts of Appeals As to the Interpretation of "Based Upon"

Respondents concede the existence of a split among the courts of appeals as to the meaning of the "based upon" phrase in §3730(e)(4)(A), and attempt only to minimize the *degree* of the split among the circuits. *See* Astorino Brief, at 11. However, in addition to being irrelevant to the pertinent issue, *i.e.*, whether a circuit split exists, Respondents' attempts to downplay the degree of the split are factually incorrect.

For example, Respondents do not dispute that the Third Circuit panel majority adopted an interpretation of

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[1] With the exceptions of Sections I and II thereof, which incorporate the Brief of the Astorino Respondents and make other arguments addressed in this Reply, HACP's Brief raises arguments that are not properly before and should not be considered by this Court and will not be addressed in this Reply. These improper arguments are that HACP did not present a "knowingly" false claim to HUD, as required by the Act, and that Mistick's claims are barred by the doctrine of *res judicata* and/or the alleged terms of a release. *See* HACP Brief, at 12-25. These arguments were not addressed by either the District Court or the Third Circuit, and in fact, at oral argument before the Third Circuit panel, the court specifically indicated to counsel for HACP that the District Court should address those issues in the first instance. *See* Transcript of 6/9/98 Argument, at 37-38. Moreover, the HACP's improper arguments are irrelevant to this Court's standards and reasons for granting *certiorari* as addressed in Mistick's Petition.

"based upon" that directly conflicts with the Fourth Circuit's "derived from" plain language interpretation of that phrase in *United States ex rel. Siller v. Becton Dickson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994). Rather, Respondents merely quibble over whether the First and Seventh Circuits really adopted the Fourth Circuit's *Siller* ruling. However, in *United States ex rel. LeBlanc v. Raytheon Co.*, the First Circuit explicitly affirmed the district court's ruling that "[i]n light of the plain meaning of the words 'based upon,' this Court is inclined to agree with the Fourth Circuit" interpretation as set forth in *Siller*. *United States ex rel. LeBlanc v. Raytheon Co.*, 874 F. Supp. 35, 40-41 (D. Mass.), *aff'd* 62 F.3d 1411 (1st Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996). As noted in Mistick's Petition, the First Circuit issued an unpublished opinion affirming the district court's judgment "for substantially the reasons elucidated in the opinion below." *See* Mistick Petition, at 17 n.16 (*citing United States ex rel. LeBlanc v. Raytheon Co.*, 1995 WL 471105, at *1 (1st Cir. Aug. 9, 1995) (Selya, J.)).

Respondents contend that the First Circuit's affirmance of *LeBlanc* somehow does not really count because the First Circuit "did not write an opinion," but rather "summarily affirmed." *See* Astorino Brief, at 12. That contention, however, is directly contrary to established law. This Court specifically has treated a court of appeals' summary affirmance *without* published opinion of a district court's published opinion as sufficient to create a circuit split. *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-25 & n.6 (1975). Moreover, as a matter of general practice, an unpublished opinion of a court of appeals binds other panels of that court. *See* 16A Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 3d §3981.1 (1999); *see also Harris v.*

Menendez, 817 F.2d 737, 740 (11th Cir. 1987) (describing a court of appeals' published affirmance of a district court opinion "for the reasons and authorities cited" therein as "effectively adopt[ing] and republish[ing] as an appellate opinion the district court's opinion").[2]

Similarly, in *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), the Seventh Circuit expressly found that "[t]he Fourth Circuit's interpretation of 'based upon' is the better on the grounds both of plain meaning and public policy." *Id.* at 863. Contrary to Respondents' assertions, the Seventh Circuit specifically applied the Fourth Circuit's "derived from" interpretation of "based upon," which it described as the "preferred" reading, in determining that the relator's complaint was barred under §3730(e)(4). *Id.*

Respondents also suggest that there is, somehow, no actual split among the circuits because the First, Fourth and Seventh Circuits have not expressly discussed whether a plain meaning interpretation of "based upon" in §3730(e)(4)(A) renders the "original source" provision of

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[2] By local rule, the First Circuit has stated that where a district court opinion is "published, the order of court upon review shall be published even when the court does not publish an opinion," although an unpublished opinion may be cited only in "related cases." *See* 1st Cir. R. 36.2(b)(5) & (6). The First Circuit has also stated that it may rely on an unpublished opinion, even if the rules of the court issuing the opinion would not so allow, to the extent the rationale of those rules is unavailability of the opinion and the opinion in fact is available to the parties. *See Aviles v. Burgos*, 783 F.2d 270, 283 & n.4 (1st Cir. 1986) (addressing unpublished opinion of Supreme Court of Puerto Rico).

the next section, §3730(a)(4)(B), superfluous. This is simply not a serious argument. The pertinent issue is whether the circuits have split as to the meaning of the phrase "based upon" in the statute, not whether some particular chain of reasoning favored by Respondents was or was not employed. As explained in Mistick's Petition, and as largely conceded by Respondents, several circuits have so split. Respondents cannot eliminate that split by "wishing" it away.[3]

II. Respondents Ignore That the Third Circuit Panel Majority's Open Rejection of a Plain Meaning Interpretation of "Based Upon" Conflicts With Decisions of This Court

Respondents largely attempt to sidestep Petitioner's demonstration that the Third Circuit panel majority acted contrary to this Court's decisions mandating that a statute be interpreted according to the plain meaning of the terms chosen by Congress regardless of almost all other considerations. Respondents do not contest that the panel majority expressly decided not to apply the plain and

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[3] Similarly unrealistic, to say the least, is HACP's suggestion that Mistick's Petition is not important because HACP is subsidized by HUD and therefore a judgment against HACP would not truly add to the federal treasury. *See* HACP Brief, at 10-11. Among other defects, HACP's argument (1) appears to advocate, incredibly, that some sort of license to defraud be created for state and local agencies funded by the federal government, (2) ignores that HACP is not wholly HUD funded, (3) fails to explain why an adverse judgment for fraud would be an appropriate budget item for which HACP to receive federal funding, and (4) ignores that co-defendants, such the Respondent officers of HACP, may be personally liable for any fraud committed.

unambiguous meaning of "based upon," which the panel majority admitted is "derived from." *See United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 385-88 (3d Cir. 1999) (Appendix A at 21a-27a). Nor do Respondents appear to contest, at least directly, that under this Court's decisions, plain language interpretation is the "cardinal canon before all others" and "when the words of a statute are unambiguous, *then, this first canon is also the last: 'judicial inquiry is complete.'*" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (emphasis added).[4]

Similarly, also unanswered are this Court's consistent rulings that "[r]edundancies across statutes are not unusual events in drafting," and that "so long as there is no 'positive repugnancy' between two laws," poor drafting does not give the courts license to disregard the plain meaning of the terms chosen by Congress. *Id.* (*citing Wood v. United States*, 16 Pet. 342, 363 (1842)); *H.J. Inc.*

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[4] Respondents do suggest that *Connecticut National Bank* gave primacy to a plain language interpretation only because no part of the statute at issue would have been rendered superfluous as a result. *See* Astorino Brief, at 23. In fact, however, at the very most, this Court suggested only that "giving effect to both [of the provisions at issue] would not render one or the other *wholly* superfluous . . .." *Connecticut Nat' Bank*, 503 U.S. at 253 (emphasis added). Thus, *Connecticut National Bank* makes clear that plain language interpretation must be followed so long as one of the provisions retains even minimal independent significance, and is entirely is consistent with Petitioner's position here. *See* Mistick Petition, at 22-23 (explaining how "original source" provision of 3730(e)(4)(B) would continue to retain at least some independent significance under a plain language interpretation of "based upon"); *Mistick*, 186 F.3d at 399-400 (Appendix A at 53a-55a) (Becker, C.J., dissenting) (same).

v. Northwestern Bell Tel. Co., 492 U.S. 229, 249 (1989); *United States v. Locke*, 471 U.S. 84, 95 (1985).

Instead, Respondents obfuscate the actual issue by contending that Petitioner has failed to address the canon of statutory interpretation regarding rendering terms superfluous, *see* Astorino Brief, at 22-23, which under this Court's decisions, as noted previously, is merely a *subsidiary* canon of interpretation. In purported support for their contention, Respondents cite to *United States v. Correl*, 389 U.S. 299 (1967), for the proposition that the doctrine of avoiding superfluous interpretations "must be invoked, even if the plain language of a statute is unambiguous." *See* Astorino Brief, at 23. This, however, is an incorrect citation to *Correl*.

To the contrary, it was precisely because the statute at issue in *Correl* was *ambiguous*, and "no appeal to the 'plain language' of the section [could] obviate the need for further statutory construction," that reliance on additional rules of statutory interpretation became necessary in that case. *See Correl*, 389 U.S. at 304 n.16. As such, *Correl* actually supports *Petitioner's* position in this case, insofar as the term "based upon," as even the Third Circuit panel majority admitted, has a plain and unambiguous meaning of "derived from."

III. Respondents Misunderstand the Issue Presented Regarding the "Administrative Report" and "Administrative Investigation" Terms of the Act

Respondents summarily dismiss Mistick's disagreement with the Third Circuit panel majority's characterization of Petitioner's FOIA request as an "administrative report" or "administrative investigation"

under §3730(e)(4)(A). According to Respondents, the panel majority's decision "is in accord with every other Circuit that has addressed the issue." Astorino Brief, at 9.

Respondents again, however, have misconstrued the pertinent issue. Even assuming for the sake of argument that a response to a FOIA request may be a "public disclosure" in some sense,[5] this is the *beginning, not the end*, of the analysis under §3730(e)(4)(A). The pertinent issue then becomes whether that "public disclosure" is *also* made "in a criminal, civil or administrative hearing, in a congressional, *administrative* or Government Accounting Office *report*, hearing, audit, or *investigation*, or from the news media," as the statute explicitly requires. *See* 31 U.S.C. §3730(e)(4)(A) (emphasis added).

Here, the Third Circuit panel majority held, out of all bounds with the plain meaning of language, that the FOIA request generated an "administrative report" in an "administrative investigation" under the statute, and *these* are the issues Mistick brings before this Court. *See* Mistick Petition, at 24-26. *Nowhere* do Respondents, or the cases they cite, address these issues.[6]

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[5] *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997); *see also United States ex rel. Burns v. A.D. Roe Co., Inc.*, 186 F.3d 717 (6th Cir. 1999).

[6] *Burns* in fact *endorses* Petitioner's contention that "[c]ourts that have considered the issue of sources of public disclosure note that the list of sources set out in the statute is exhaustive." *Burns*, 186 F.3d at 725 (*citing United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 744 (3d Cir. 1997)).

IV. Respondents Evade Mistick's Interpretation of the "Original Source" Provision

Respondents evade the specific arguments made in Mistick's Petition regarding the Third Circuit panel majority's conclusion that Mistick failed to qualify as an "original source" under §3730(e)(4)(B). *See* Mistick Petition, at 27-28. As noted by Mistick, the panel majority's key point of departure from decisions of other courts in this regard is its requirement that a relator in effect have "direct and independent" knowledge of *both* the essential elements of the fraud, *i.e.*, both the misrepresented state of facts ("X") and the true state of facts ("Y"), to qualify as an original source. *See* Mistick Petition, at 27 (citing *Mistick*, 186 F.3d at 388-89 (Appendix A at 27a-28a)).

Decisions of other courts of appeals, as well as, ironically, a prior decision of the Third Circuit, have ruled to the contrary that a relator need only have "direct and independent" knowledge of *either* the misrepresented state of facts (X) *or* the true state of facts (Y) to qualify as an original source. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 969 (9th Cir. 1999) (relator was original source even though it did not learn basis for claims of false statements to government until discovery in *qui tam* action), *petition for cert. filed*, No. 99-1060 (Dec. 21, 1999); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) (relator is original source where it has direct and independent knowledge of any essential element, X or Y); *see also United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) ("undoubtedly, it is not

necessary for a relator to have all the relevant information in order to qualify as 'independent'").

Under these decisions, a relator whose *qui tam* claim would otherwise be barred under §3730(e)(4)(A), as partially "based upon," *i.e.*, "derived from," a qualifying statutory "public disclosure," could nevertheless qualify as an "original source" under §3730(e)(4)(B), meaning that the original source provision is not rendered superfluous by interpreting "based upon" plainly. *See* Mistick Petition, at 21-23, 28. In contrast, by requiring that a relator have direct and independent knowledge of both the "X" and "Y" elements, the panel majority here in effect has rewritten §§3730(e)(4)(A) and 3730(e)(4)(B) so that each of these provisions applies the *same* jurisdictional standard, rendering one or the other provision superfluous. *See* Mistick Petition, at 27.

CONCLUSION

For all the foregoing reasons, this Court should grant Mistick's Petition for Writ of Certiorari.

Respectfully submitted,

JOHN E. BEARD, III *(Counsel of Record)*
PETER N. FLOCOS
Counsel for Petitioner

FEBRUARY 28, 2000